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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**GASTON CAPERTON**  
Governor

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PATRICIA WOLFE

v.

Docket No. T-88-011

WEST VIRGINIA TAX DEPARTMENT

**DECISION**

Grievant Patricia Wolfe is an employee of Respondent West Virginia Tax Department. On August 3, 1988, she initiated the following grievance at Level I:

I was unfairly denied the position of Tax Unit Manager II. Relief sought - to be awarded the position and awarded back pay and to be made whole for the time I was performing the duties of this position.

After denials at Levels I and II, Grievant advanced her claim to Level IV on September 22, 1988. Inasmuch as the matter had not been submitted or considered at Level III, this Grievance Board, by order entered October 6, 1988, remanded the matter for Level III attention. A Level III

hearing was conducted on January 9, 1989,<sup>1</sup> and a decision denying relief followed. Thereafter, Grievant reinstated this complaint at Level IV, and hearing was held March 22 and May 8, 1989.<sup>2</sup>

At the outset of the Level IV hearing it was revealed that Grievant had applied for, and been denied, the Tax Unit Manager II post in January 1988. Grievant explained that she had learned only in late July 1988 that she might have a grievance over her non-selection, when a fellow employee made her aware that there were two distinct vacancy notices posted for the job in question. Respondent agreed that there were two notices, precisely the same in all particulars save an entry under the heading "Minimum Training and Experience Requirements," as follows:

TRAINING: Graduation from an accredited four-year college or university. Special requirements as described below may apply.

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<sup>1</sup> Transcript of this hearing is a part of the record of this case.

<sup>2</sup> The issue of Grievant's working out of classification in 1987 and early 1988 was not heard on March 22 based on W.Va. Code §29-6A-11, which limits this Grievance Board's jurisdiction over state personnel matters to those arising on or after July 1, 1988. Shortly after March 28, 1989, the date of AFSCME v. CSC ("AFSCME IV"), #17929 (W.Va.S.Ct.App.) and the jurisdictional window created, see Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989), a supplemental Level IV hearing on the classification matter was scheduled for May 8. See Concl. Law 2.

Prior to the May 8 meeting, the parties agreed that the non-selection issue had been thoroughly dealt with by the March 22 session and its attendant submissions, and that the only question left was that of Grievant's February 1987-March 1988 classification.

SUBSTITUTION: Experience as described below may substitute for the required training, **including six semester hours of accounting**, on a year-for-year basis.

EXPERIENCE: Six years experience in the area of assignment as determined appropriate by the appointing authority, two years of which must have been in a lead worker, supervisory, or administrative capacity.

...  
SPECIAL REQUIREMENT: Six semester hours of accounting is required. . . .

The language in **bold** above appeared in the vacancy notice Grievant first saw in July 1988, but was not part of the announcement upon which Grievant based her January 1988 application. Grievant admitted that she considered herself unqualified based on the notice she saw, since she is without college hours in accounting, but that she submitted an application "thinking that they might give it to me because I'd already been doing the work anyway."<sup>3</sup> The unrefuted evidence is that Respondent's Personnel Director marked the application DNQ ("Does Not Qualify") in Grievant's presence as soon as she received it.<sup>4</sup> The post was not actually filled until March 15, 1988.

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<sup>3</sup> The undersigned has attempted to capture the essence of pertinent testimony rather than quote it verbatim.

<sup>4</sup> It seems to the undersigned that the difference noted is not material and that Grievant might have been considered qualified under either notice. However, Respondent's Personnel Director testified that the discrepancy was significant and, inasmuch as the version without the "including six semester hours. . ." phrase comported with the official Civil Service classification description, that  
(Footnote Continued)

After the March 22, 1989, meeting, the parties were allowed until April 14, 1989, to file post-hearing briefs. On April 1, Grievant submitted a letter outlining her argument as follows:

1. There are two issues in this grievance:

- (a) Patricia Wolfe was unfairly denied the position of Tax Unit Manager II.
- (b) Payment of back pay for performing duties of a higher classification from February 2, 1987 to March 15, 1988.

(a) The Tax Unit Manager II position was posted in early January 1988. Patricia Wolfe applied for the position and was advised by the Personnel Department that she did not meet the minimum qualifications. After the move to a new building in late July, 1988 Patricia Wolfe was made aware, by accident, by a fellow employee that two postings were placed on the bulletin board with different specifications attached for the Tax Unit Manager II. Upon learning this information, Patricia Wolfe filed a level I grievance on August 3, 1988.

On July 1, 1988, the West Virginia Education and State Employees Grievance Board was created and the Civil Service Commission grievance procedure was abolished. In AFSCME v. Civil Service Commission of West Virginia, . . . No. 17929 Contempt, the court held "Until 1988, in conjunction with its rule making, the Civil Service Commission also administered grievance procedures for civil service employees. These procedures were expressly abolished by the new grievance statute, . . . [W.Va. Code]§29-6A-1. Very broadly, the purpose of the new statute is to "provide. . . for the equitable and consistent resolution of employment grievances." Civil Service lost its grievance ability July 1, 1988. Patricia Wolfe did not become aware

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(Footnote Continued)

Grievant did not meet minimum qualifications to be a Tax Unit Manager II.

that she had a grievable matter until July 29, 1988. The consequences flow after July 1, 1988. It was uncontested that she became aware of a grievance of July 29, 1988 and no other procedure exists.

(b) In AFSCME V. Civil Service Commission of West Virginia, ET AL., No. 17929 Contempt, the court held "all other such grievances that arose prior to July 1, 1988, must be resolved in accordance with the grievance procedures of . . . [W.Va. Code §]§29-6A-1, et seq. We are advised that the identity of some employees who have worked out of classification is yet unknown. To allow equal opportunity for all affected employees to file grievances, consistently with our prior AFSCME cases, we will allow the grievances to be filed within ninety days of this opinion."

The court is allowing ninety days from its March 28, 1989 decision for back pay claims to be filed with the West Virginia Education and State Employees Grievance Board even though the time frames are prior to July 1, 1988.

With regard to the jurisdiction question generally, no affirmative defense was made in the first three levels of the grievance procedure[;] therefore, they should be waived. It is the responsibility of the employer to raise these issues not the judge.<sup>5</sup>

2. [W.Va. Code §]29-6A-4(a) states "within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant. . . .

Patricia Wolfe did not become aware that grievable matter until July 29, 1988, and a Level I grievance was filed August 3, 1988, well within the required time frames.

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<sup>5</sup> Grievant's position on this point is without merit. Jurisdictional questions are always the primary concern of a judicial officer and may appropriately be raised by him or her at any time.

W.Va. Code §29-6A-11 provides, in pertinent part, as follows:

This article [§§29-6A-1 et seq.] applies to all grievances arising on or after. . .July 1, 1988. .  
.. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission upon the resolution of all grievances and appeals pending in the civil service system on. . .July 1, 1988. . .

On May 8, it was established that for most of the time between February 1987 and her retirement in January 1988, Grievant's immediate supervisor, Section Chief IV Louise Garges, was absent from work due to illness.<sup>6</sup> Grievant explained that at some point prior to February 1987, "Louise classified me as a Lead Worker," and that she, Grievant, had willfully accepted this categorization, which purportedly afforded potential "experience and qualification for promotion."<sup>7</sup> It is undisputed that Grievant was the only Lead Worker in her unit, and that she understood part of her responsibility in this capacity was to fill in for her supervisor as needed. Respondent's Exhibit B, a January 31, 1989, memorandum from June Syndenstricker, Personnel Officer

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<sup>6</sup> Ms. Garges' retirement created the Tax Unit Manager II vacancy for which Grievant applied and was rejected, as recounted in this Decision.

It is noted that Ms. Garges was not absent for the entire period February 1987-January 1988, and that Grievant was on annual and/or sick leave for some of this time.

<sup>7</sup> It is unclear from the record precisely what guaranteed benefits, if any, flowed from being categorized a Lead Worker.

for the Tax Department, lists "[a]cts on behalf of supervisor in his or her absence" as one of the "Duties of a Lead Worker." Grievant explained that she performed the following specific tasks on Ms. Garges' behalf while Ms. Garges was on leave: signing leave slips, preparing monthly reports, assigning and reviewing work, reprimanding employees, making leave request decisions, evaluating personnel, and attending manager/section chief meetings. She also said she had to delegate duties to other Personal Income Tax Unit staff, and this was verified by witness Donna Wells and others. Finally, she averred that "Carson [Gillman] said I was in charge of the unit." In February 1988, Grievant claimed in writing that she had "been operating in the position of Section Chief IV, in the absence of Louise Garges, for the last three years," Resp. Ex. D; in April 1988, she complained "I supervised in the absence of my Section Chief. . .for a full year and have worked out of classification for the last 3 years."<sup>8</sup> Interestingly, however, Grievant admitted at Level IV that she was not aware of all Ms. Garges' on-the-job-functions.

While there is guidance on "Duties of a Lead Worker," i.e., Resp. Ex. B, the Sydenstricker memo referenced supra, apparently there is no formal Civil Service job description

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<sup>8</sup> Grievant has apparently abandoned any claim of working out of classification save for the time Ms. Garges was ill and off the job, through March 15, 1988.

for such an employee. However, that memo is based on "a [Civil Service] list of job elements commonly referred to as lead worker responsibilities," which list was provided to Respondent by Civil Service upon Respondent's inquiry regarding the appropriate role of Lead Workers. Resp. Ex. B. Mr. Gillman, Ms. Garges' immediate supervisor, appeared and testified that Lead Workers within the State Tax Department are authorized to perform tasks including signing leave slips and giving oral reprimands, but only in their Section Chief's absence.<sup>9</sup> With regard to Grievant, he explained she had no responsibility in crucial areas including budget, hiring/firing or employee evaluation between February 1987 and March 1988, although she might have aided him with the latter duty. Ms. Syndenstricker's testimony corroborated this information. Mr. Gillman also declared that there came a time certain when he instructed Grievant to discontinue issuing leave slips; Grievant denied ever receiving such a directive, and the evidence reflects that she continued to sign slips after the date Mr. Gillman identified. Gr. Ex. 6.

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<sup>9</sup> Mr. Jeff Oaks, employed by Respondent in a unit other than Grievant's, testified that the Lead Worker in his area did not perform the same level of duties as did Grievant. Since his duty station was not the same as Grievant's, it is uncertain how reliable this view could be. Even assuming he was correct, the pertinence of his statements to this case is limited.



Mr. Gillman added that on one occasion he had authorized Grievant to reprimand an employee, apparently in writing, for tardiness.

Following the May 8 portion of the Level IV hearing, the parties were granted until June 15 to present proposed findings of fact and conclusions of law and/or briefs on the classification issue. In addition, Respondent filed a Motion to Dismiss this entire grievance, arguing it was not timely filed at Level I per W.Va. Code §29-6A-4(a), and, in the alternative, that Grievant did not meet the minimum qualifications for Tax Unit Manager II due to her lack of accounting classes.<sup>10</sup>

It is apparent that Grievant performed much of her superior's work while Ms. Garges was unable to be in the office. It is likewise clear that Grievant, as Lead Worker, had knowingly accepted the responsibility of substituting for her supervisor when necessary, and that she did not perform all Ms. Garges', including some particularly important ones. While the undersigned is unsure whether or not Lead Workers were ever intended to fill in for their ill administrators for extended periods,<sup>11</sup> it appears that

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<sup>10</sup> This motion was in essence a renewal of an earlier-filed petition, which was voided by the remand to Level III. Both motions and their attendant materials were reviewed by the undersigned in the preparation of this Decision.

<sup>11</sup> In fact, Ms. Syndenstricker, in her January 31,  
(Footnote Continued)

Respondent had no basis for permanently replacing Ms. Garges during her infirmity leave and that Grievant assumed the "fill-in" role, as needed, due to her Lead Worker title. This role was in conformity with Civil Service policy, as outlined in the Sydenstricker memo.<sup>12</sup>

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant, an employee of Respondent, performed many, but not all, of her supervisor Louise Garges' duties while Ms. Garges was on sick leave February 1987-January 1988, and, after Ms. Garges' retirement in January, until the post was permanently filled March 15, 1988. Grievant was "Lead Worker" in her unit, which required her to fill in for Ms. Garges when she was absent. Certain tasks Grievant did not perform were related to budget, hiring/firing, employee evaluation, and other significant managerial functions.

2. Grievant applied for a promotion to Tax Unit Manager II in January 1988, in response to a posted vacancy notice which listed six college hours of accounting as a

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(Footnote Continued)

1989, memorandum, recommended to Respondent's Division Directors that Lead Workers be utilized "on a rotational basis, i.e., six-month or less assignment." Resp. Ex. B.

<sup>12</sup> It is noteworthy that Grievant presented nothing to refute the validity of this memorandum or the information contained therein.

requirement for the position. She was immediately advised by Respondent's Personnel Officer that she did not qualify based upon her lack of such hours and that she would not receive the job.

3. In July 1988, Grievant was first made aware of a slightly different version of the same vacancy notice, which stated that certain experience could substitute for the college accounting classes. Believing herself to have adequate substitutional experience, she initiated this grievance.

4. The notice upon which Grievant based her January application was the official and correct one, in light of policies of Respondent and the West Virginia Civil Service System. Therefore, Grievant did not meet the minimum qualifications for Tax Unit Manager II.

#### CONCLUSIONS OF LAW

1. The state employees' grievance procedure has applicability to matters arising on or after July 1, 1988. W.Va. Code §29-6A-11.<sup>13</sup> However, with regard to classification disputes, a "jurisdictional window" was opened for ninety days by the Supreme Court of Appeals of West Virginia. AFSCME v. CSC, #17929 (Mar. 28, 1989).

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<sup>13</sup> Certain exceptions to this, e.g., those created by AFSCME IV, are not relevant to the instant case.

2. This grievance, insofar as it relates to Grievant's non-selection for the Tax Unit Manager II post, arose in January 1988 and therefore this Grievance Board is without jurisdiction to consider it. Code §29-6A-11.<sup>14</sup>

3. This grievance, insofar as it relates to Grievant's claim for back pay due to her alleged misclassification from February 1987 to March 1988, is within the jurisdiction of this Grievance Board because of the "window." See Epling v. W.Va. Dept. of Health, Docket No. 89-H-107 (Apr. 13, 1989).

4. Although Grievant was performing many of her supervisor's duties from February 1987 through March 1988, she was without responsibility for several significant administrative tasks, and, as Lead Worker, part of her job was to fill in for her absent supervisor. Therefore, she is unentitled to back pay or other relief for the period.

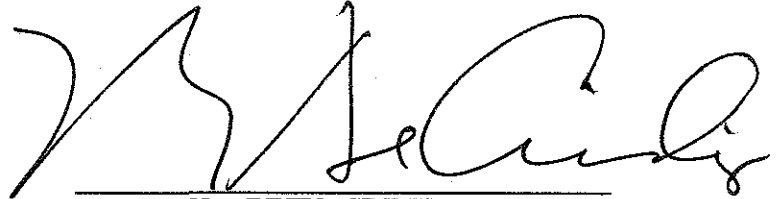
Accordingly, this grievance is **DENIED**.<sup>15</sup>

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<sup>14</sup> Clearly, the action which gave rise to any claim Grievant may have in these particulars was the rejection of her application in January 1988; it does not appear that there is any affirmative activity on Respondent's part which could possibly classify this situation as "continuing" under §29-6A-4. See Dennison v. Braxton Co. Bd. of Educ., Docket No. 04-88-251 (Mar. 17, 1989) (interpreting parallel education employee grievance procedure, W.Va. Code §18-29-4). Even if there were, the claim would be without merit, based on Finding of Fact 4.

<sup>15</sup> Respondent's Motion to Dismiss is hereby mooted.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in black ink, appearing to read 'M. Drew Crislip', written over a horizontal line.

M. DREW CRISLIP  
HEARING EXAMINER

Dated: July 28, 1989